STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2005
v	No. 255632 Kent Circuit Court
LEON LAVIL WILSON, Defendant-Appellant.	LC No. 03-003846-FC

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

A jury found defendant guilty of second-degree murder, MCL 750.317, for the immolation death of Ladena Wilson. He was sentenced to life imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to convict of second-degree murder. We disagree. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A conviction for second-degree murder requires proof of (1) a death, (2) caused by the defendant's actions, (3) with malice, and (4) without justification or excuse. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). The malice element mandates proof that the killing was accomplished with one of three states of mind: an intent to kill; an intent to do great bodily harm; or an intent to create a very high risk of death knowing that one's actions probably will cause death or great bodily harm. *Id.* at 269-270. Malice may be inferred from the facts and

circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice may also be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Flowers*, 191 Mich App 169, 177; 477 NW2d 473 (1991).

In this case, the jury could have reasonably inferred malice on defendant's part from eyewitness testimony, Wilson's statements, defendant's own statements, and expert testimony on the interpretation of the physical evidence at the scene. Shabona Banks, Wilson's friend, testified that on the night of the fire defendant told her that he and Wilson had an earlier argument because Wilson, the mother of his children, was keeping the children from him. Belinda Thomas testified that defendant came to her house on the night of the fire enraged and demanded to know Wilson's whereabouts. Defendant stated that Wilson would not see her children again.

Arthur Thomas testified that he saw defendant on top of Wilson earlier that night before the fire started, punching her in the face. Fredrick Thomas testified that he saw defendant and Wilson inside a vehicle arguing. Thomas saw the vehicle suddenly burst into flames, and he saw defendant jump out of it. He then saw Wilson jump out of the vehicle, shouting, "he set me on fire, he set me on fire." Another man, Robert Baskin, also testified that he heard a woman yell, "he poured gas on me, he set me on fire, help me." Willie Martin testified that he heard a girl yelling that defendant threw gasoline on her and set her on fire and that defendant denied it. Cheryl Huberts, an emergency room nurse who cared for Wilson before she died, testified that she asked Wilson "is there anything you want me to say to anybody?" Wilson "told [her] to tell her babies that she loved them and that their daddy did this to her."

Police officer Thomas McCarthy testified that defendant told him that Wilson put the gas can between her legs, started smoking a cigarette, and caught her hand on fire. Wilson's mother, Helen Wilson, testified that she heard defendant tell the officer that story, but then at the hospital he gave her a different explanation of what happened, saying that her daughter poured gas all over herself, then lit a cigarette.

Dr. Stephen Cohle testified that Wilson died from third-degree burns covering almost her entire body. Richard Wilcox, a surgeon specializing in burns, testified that skin and clothing will burn, but they will not flame up without an accelerant present. Gregory Stormzand, a detective who investigated the fire, testified that lit cigarettes cannot ignite gas. John Dehann, a forensic scientist who also investigated the fire, testified that, in his opinion, defendant set the fire deliberately by pouring gas on the victim. He found no evidence supporting defendant's statement that he grabbed Wilson and tried to put out the fire by rolling her on the ground, because if he had, his cotton tee shirt would have been scorched, and it was not. Dehann also stated that the burns on defendant's arm and hand were consistent with him placing an ignition source, such as a lighter, near the decedent while she had gas on her, thereby setting her on fire. He also stated that a cigarette could not have ignited the gasoline vapors, and considering the amount of damage that was incurred in a short amount of time, a considerable amount of gasoline had to have been spread on the decedent and the inside of the vehicle.

Much of defendant's argument focuses on a lack of credibility as to particular witnesses or points to conflicting evidence, neither of which warrant reversal in the context of a sufficiency argument. See *Wolfe, supra* at 514-515; *Terry, supra* at 452. In sum, there was sufficient evidence to convict defendant of second-degree murder.

Defendant next argues that the trial court abused its discretion when it admitted witness testimony regarding statements made by Wilson immediately after she was set on fire. Again, we disagree. This Court reviews the trial court's rulings on the admission of evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). If the decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes admissibility, this Court reviews the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant claims that the statements made by Wilson immediately after she was set on fire and fled from defendant's truck constituted hearsay and should not have been admitted as either excited utterances or present sense impressions. MRE 801(c) provides that hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible unless it falls into one of the exceptions under the rules of evidence. MRE 802.

Turning first to the excited utterance exception to the hearsay rule, MRE 803(2) defines an excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception to the hearsay rule allows testimony to be admitted that would otherwise be excluded because it is perceived that a person who is still under the "'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998)(citation omitted). For a declarant's statement to qualify as an excited utterance, first there must have been a startling event, and second the declarant must still have been under the excitement caused by the event when making the challenged statement. *People v Straight*, 430 Mich 418, 423-424; 424 NW2d 257 (1988).

In this case, the challenged statements were made by Wilson, the declarant, as her whole body was either on fire or still smoking after the flames had just been extinguished. It is beyond dispute that being doused with gasoline and set on fire while alive constitutes a startling event. Furthermore, Wilson clearly made the statements while still under the excitement caused by the event; she was screaming, "standing up, completely naked, and her body was smoking and badly burned." Given these circumstances, Wilson's statements admitted through the above witnesses constituted excited utterances, and therefore the statements were properly admitted by the trial court. In light of our ruling, it is unnecessary to reach the issue whether the statements also constitute present sense impressions under MRE 803(1), although we note that the exception is equally applicable and provides additional support for admissibility.

Defendant also objects to the testimony of nurse Cheryl Huberts regarding Wilson's deathbed statement that defendant "did this to her." Defendant argues that the trial court abused its discretion by admitting the evidence as a dying declaration under MRE 804(b)(2). MRE 804(b)(2) provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * *
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> (2) In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

It is not necessary that the declarant actually state that she knew death was imminent to satisfy the dying declaration exception. *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988). It is enough that the declarant was *in extremis*, meaning near death, and that the facts and circumstances of the case demonstrate that the declarant was conscious of her impending death. *Id.* at 251-252.

The circumstances surrounding Wilson's statements to Huberts show that the trial court did not err in determining that the statements were made *in extremis* and that Wilson was conscious of her impending death. She was lying in a hospital, with the skin burned off of over ninety-five percent of her body, having trouble talking because her airway was burned, and being asked by a nurse if she had anything to say to anybody. Given these circumstances, defendant has not shown that the trial court erred in admitting Wilson's statements as dying declarations.

Defendant also argues that the trial court's sentence of life in prison is disproportionate. The sentencing guideline range was 225 to 375 months or life. The trial court sentenced defendant to life. Because this sentence was within the guideline range, the trial court did not exceed or depart from the guidelines. Under MCL 769.34(10), if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004). Defendant does not allege that the trial court erred in the scoring of the guidelines or relied on inaccurate information,[1] therefore his sentence must be affirmed.

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[1] Defendant submitted supplemental authority, which in reality is not supplemental authority but rather constitutes the presentation of a new issue, that being that the trial court impermissibly increased scoring variables on the basis of findings not reflected in the jury verdict. In support of this proposition, defendant relies on *United States v Booker*, 543 US _; 125 S Ct 738; 160 L Ed 2d 621 (2005)(federal sentencing guidelines subject to jury trial requirements of the Sixth Amendment). We shall not consider the issue because it was not properly presented to us in a (continued…)

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis

(…continued)

statement of questions presented, MCR 7.212(C)(5), and because defendant fails to provide any details whatsoever in support of his argument. There is no discussion, recitation, or mention of the particular sentencing factors supposedly at issue and the interplay between the factors and the facts encompassed by the verdict, which facts are also not discussed. It is insufficient for an appellant to simply announce a position or assert an error and then leave it up to this Court to rationalize and discover the basis for his claims, or unravel and elaborate for him his arguments. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998)(citation omitted).